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Three theories of judicial balancing : a comparison

Alessio Sardo

1. Introduction

The aim of this paper is quite modest. I endeavour to: 1) provide a reconstruction of three of the most prominent theories of judicial balancing; and 2) briefly analyse some of their basic presuppositions, focusing on the problem of value judgements, the opposition between particularism and universalism, and the concept of concretisation.

I will not draw any definitive conclusions; rather, I will strongly suggest that: a) *concretisation,* and not balancing, is the central feature of constitutional adjudication; and b) the grounds of concretisation are *subjective value judgements*.

2. Professor Guastini : A sceptical and emotivist theory of judicial balancing

Professor Guastini has written about judicial balancing on several occasions. Insofar as his theses on the subject are fully integrated into his theory of legal interpretation, it will be necessary to briefly sketch out the main features of the latter. Riccardo Guastini proposes a particular kind of rule scepticism that has mainly been inspired by the works of Hans Kelsen, Alf Ross and Giovanni Tarello. His theory is characterised by two main theses. The first one is the distinction between normative sentences (*disposizioni*) and norms (*norme*). All legal texts are *normative sentences*: they

[1] I would like to thank Mauro Barberis and Nicola Muffato: they slogged through previous drafts of this article and gave me valuable advice and suggestions. I would also like to thank Laurence Clayton-Trotman for the revision of the English version of this article and for advice on matters of English style.

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are statements or sets of statements expressing a finite number of potential norms; they are the objects of interpretation, and they can be considered norms only in a broad sense. Conversely, *norms* are the meaning-content (or the sense-content) of legal texts, which can only be obtained through the interpretation process[3]. In recent years, this distinction between normative sentences and norms has become almost a platitude in legal theory. In Guastini's account, *one* normative sentence can 'entail' *more than one norm* (namely, a set of norms), but it should not be considered as a 'blank screen': the list of potential meanings that are ascribable to a certain statutory sentence is finite; these meanings are contained within the limits of a frame (*Rahmen*)[4]. In partial contrast with Hans Kelsen's own view, Riccardo Guastini conceives the frame as a boundary constituted by pragmatic as well as semantic elements: the plurality of interpretive methods, 'legal dogmatics' and the sense of justice of the interpreters. The second main thesis can be summed up as follows: legal interpretation, in a strict sense, consists of the operation of attributing meaning to a legal text; it cannot be properly described just as the activity of *identifying* the content of the normative sentences (*cognitive interpretation*)[5] since it is also and primarily: I) the activity of *choosing* and *proposing* one of the several meanings identifiable by means of cognitive interpretation, while discarding the others (*adjudicative interpretation*)[6]; or II) the activity of ascribing *new* meanings to legal texts (*creative interpretation*)[7]. While cognitive interpretation is a purely scientific operation and can only be considered the starting point of the judge's reasoning, adjudicative

[3] See e.g. Ricardo Guastini, Rules, Validity and Statutory Construction in Anna Pintore & Mario Jori (eds), Law and Language – The Italian Analytical School, Deborah Charles Publications, Liverpool, 1997; L'interpretazione dei documenti normativi, Giuffr , Milano, 2004 at 11; Interpretare e Argomentare, Giuffr , Milano, 2011, at 8 and 63.

[4] Riccardo Guastini, Rules Scepticism Restated, in Leslie Green & Brian Leiter (eds), Oxford Studies in Philosophy of Law, Vol. I, Oxford University Press, Oxford New York, 2011.

[5] Hans Kelsen, Reine Rechtslehere, Second Edition 1960, English Translation, The Pure Theory of Law, University of California Press, Berkeley, CA 1967, reprinted by The Lawbook Exchange Ltd, Clark, NJ at 355: «Jurisprudential [i.e., cognitive] interpretation can do no more than exhibit all possible meanings of a legal norm. Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it, but must leave the decision to the legal organ who [...] is authorized to apply the law».

[6] Id. at 354: «In the application of law by a legal organ, the cognitive interpretation of the law to be applied is combined with an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation».

[7] Id. at 354: «By way of authentic interpretation (that is, interpretation of a norm by the law-applying organ), not only one of the possibilities may be realized that have been shown by the cognitive interpretation [...]; but also a norm may be created which lies entirely outside the frame of the norm to be applied». Cf. also Hans Kelsen, The Law of the United Nations, Stevens & Sons, London, 1950, at xv.

and creative interpretations are political (and, ultimately, ideological) operations; together with *fact-oriented interpretation* they represent the very core of the judicial process. Legal interpretation is a strategic linguistic game where the Gricean cooperative principle does not work[8]. Most of the times judges create law, consciously or not[9].

According to these premises, judicial balancing cannot be regarded as a form of interpretation in the strict sense; actually, it is defined as a form of "juristic construction"[10]: more precisely, it is an evaluative operation mainly used to solve conflicts between *constitutional principles*; these conflicts can be portrayed as antinomies *in concreto* and (in most instances) of the *partial-partial* type[11]; they are normative incompatibilities created by the interpreter on the basis of a set of *factual assumptions*. It should be stressed that Guastini maintains there is only a 'weak' distinction between principles and rules: a 'weak' distinction is neither ontological nor structural; on the contrary, it is a distinction of degree, namely a relational and non-dichotomous distinction[12].

When judges have to deal with conflicting principles, they cannot use the classical criteria for the resolution of antinomies, mainly because they are considered inefficacious. What is their strategy then? According to this first account of balancing, they build up an *axiological hierarchy* between the principles in conflict, which is the product of the intuitive operation of assigning different values to the principles at stake[13]; when this operation is over, they proceed toward the 'application' of the 'heavier' one[14]. The priority order between the principles is established in a way that is totally discretionary and which is always relative to the *constitutional case* (the latter can be an individual case, or a class of cases: this variable depends on how the constitutional review is

[8] Or, better, it works only in a partial way. See Riccardo Guastini, Interpretive Statements, in C.E. Alchourrón, E. Buligyn (eds) Normative Systems in Legal and Moral Theory, Duncker & Humbolt, Berlin, 1997, 280-292, and Rules Scepticism Restated, cit.; on this point also see Pierluigi Chiassoni, Interpretive Games: Statutory Construction Through Gricean Eyes, in Paolo Comanducci e Riccardo Guastini, Analisi e diritto 1999, Torino, Giappichelli, 2000, 79 and, obviously, Paul Grice, 'Logic and Conversation' (1967), in The Logic of Grammar, D. Davidson and G. Harman (eds), Encino, 1975, reprinted in Studies in the Way of Words, Cambridge, Harvard University Press 1989.

[9] By the way, these two theses have become characteristic features of the interpretation theory of the so-called "School of Genoa".

[10] Riccardo Guastini, Interpretare e argomentare, cit. at 209.

[11] See Alf Ross, On Law and Justice, London, Stevens & Sons Limited, 1958, at 128-130.

[12] Riccardo Guastini, Interpretare e argomentare, cit., Chapter V.

[13] Riccardo Guastini, Interpretare e argomentare, cit., at 206.

[14] In this context "heavier" is clearly used as a metaphor.

structured within a certain legal system[15]). The relationship of precedence can be easily overturned when a future analogous question should be decided[16]. Obviously, judicial balancing presupposes some form of interpretation in the strict sense, at least conceived as the operation of ascribing a *prima facie* meaning to a legal text, but these two activities are logically separated (even if they are in a strict relationship) and it therefore seems convenient to distinguish between them. However, interpretation (in the strict sense) does not represent the central step in a balancing process: it remains in the background.

I have just five remarks:

1. Somebody maintained that this theory of balancing could be labelled "particularist". This claim might be somewhat misleading. The word "particularism" is used in *at least* three different senses, both in legal theory and in practical philosophy. In the first sense (A), "particularism" refers to a (false) descriptive general account of practical reasoning, which maintains: i) that our value judgements are always relative to the concrete case; ii) that we infer the correct answer from the factual elements of the case, through peculiar intellectual functions or properties (call it a form of intuition); iii) that the truth or falseness of the propositions expressing value judgements is determined by reference to the factual elements of the particular case. I will use "particularism as a descriptive meta-ethic" to refer to this first sense. In the second sense (B), the word "particularism" refers to a normative doctrine that seeks to solve ethical conflicts through some form of equity, or case-by-case justice, and not through the application and universalisation of general norms; in other words, it does not seek to use ethical principles to solve concrete ethical problems. I will use "particularism as a normative doctrine" to refer to this second sense of the word "particularism". In the third sense (C), the term "particularism" refers to an eminently general and (mainly) descriptive statement: decisions often change from case to case, and what is considered as a good reason for action, or a conclusive norm, in a first case may not be considered a good reason for action, or a conclusive norm, in a second one. I will use "particularism as an eminently general statement" to refer to this third sense

[15] See Michel Rosenfeld, Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast, in "International Journal of Constitutional Law", No.4 (2004) 633.
[16] Id.

of "particularism".

I will show that Riccardo Guastini's theory cannot be called "particularistic" if we use this term in the first (A) or second senses (B). Accordingly, it could somewhat be considered "particularistic" in the third sense if this option were not affected by two huge problems: i) the third sense of "particularism" is unsuitable for characterising a precise position in the current debate, simply because it does not provide a clear criterion for distinguishing; ii) it seems incorrect to define an emotivist account (like Guastini's) as a variety of particularism.

Therefore, with regard to the third sense (C):

a) According to the definition – if we consider particularistic every theory that contains (or that is compatible with) the general statement we have just expressed, then it will be possible to call particularistic" almost any current ethical theory that assumes any form of context-sensitivity of practical deliberation. Thus, it will also be possible to call "particularistic" those theories that are commonly and worldwide opposed to ethical particularism, though admitting the variance of reasons. In other words, if used in the third sense, the label under discussion is unsuitable to be not only a salient characteristic of a peculiar theory, but even a definitional trait of a whole set of theories, referring to the current debate on the possibility of universalisation.

b) Particularism denies the existence of non-trivial moral principles, but not the existence of non-trivial moral truth. Conversely, moral emotivism – like Guastini's (*infra*) – denies the existence of non-trivial moral truth. It is obvious that the denial of non-trivial moral truth implies the denial of non-trivial moral principles, but this is by no means a good reason for considering emotivism as a form of particularism. Moreover, this solution can generate, as a side effect, the confusion of two different debates: I) the debate over the existence of moral truths; and II) the debate over the possibility of universalisation[17].

Now, with regard to the first two senses of "particularism" (A and B):

a) Generally speaking, Guastini's theory of balancing is a descriptive theory of how legal reasoning works within a certain legal system, and not a general meta-ethic or a normative doctrine

[17] Also see Sean McKeever and Michael Ridge, Principled Ethics. Generalism as a Regulative Ideal, Oxford University Press, Oxford-New York, 2006 at 14.

about adjudication. *A fortiori*, it should not be considered as a form of particularism as a general descriptive meta-ethic, nor as a form of particularism as a normative-doctrine.

b) Referring to the context of discovery, it is absolutely certain that Professor Guastini embraces an emotivist conception of value judgements that is very close to the one proposed: in ethics, by authors such as Alfred J. Ayer[18], Charles Stevenson[19], and the late Georg H. Von Wright[20]; in legal theory, by Axel Hägerström[21] and Alf Ross[22] among others. It is also certain that emotivism and particularism as a meta-ethic are not compatible views of practical reasoning (*supra*).

In fact, in Guastini's account: i) the hierarchy is constructed by the interpreter on the basis of a purely subjective value judgement, and this judgement is heavily determined by ideological and emotional factors[23]: there are no objective standards of correctness, nor even just for the particular case; neither are human beings guided by some sort of practical wisdom, or Aristotelian phronesis, like some authors considered to be paradigmatic defenders of particularism claim or (have at least) claimed[24]; ii) value propositions have a non-logical nature: they are not true or false because they can be considered just as the expression of the speaker's own emotions, which are psychological phenomena[25]; this thesis has always been rejected by the moral particularists.

[18] Alfred J. Ayer, Language, Truth and Logic (1936), Penguin Books, London 1946, in particular Chapter VI.

[19] Charles Stevenson, Facts and Values, Yale University Press, New Heaven, 1963.

[20] Georg H. Von Wright, Valuations – or How to Say the Unsayable, in "Ratio Juris", Vol.13 No.4 (2000) 347.

[21] Axel Hägerström, Fragan Der Objective Rattens Begrepp, partially translated in Inquires into the Nature of Law and Morals, Karl Olivecrona (ed.), Almqvist and Wiksells boktr, Uppsala, 1953. Also see Patricia Mindus, A Real Mind. The Life and Work of Axel Hägerström, Springer, Dordrecht, 2009, Chapter III.

[22] See Alf Ross, Kritik der Sogenannten Praktischen Erkenntnis, Levin & Munksgaard, Kopenhagen, 1933; On The Logical Nature of Propositions of Value, in "Theoria", Vol.11 No.3 (1945) 172.

[23] This is an ontological thesis; it is the main feature of 'moral scepticism' and also the first main thesis of emotivism/expressivism.

[24] See at least Jonathan Dancy, Moral Reasons, Blackwell, Oxford, 1993. This claim seems to have been partially abandoned in Ethics without Principles, Clarendon Press, Oxford, 2004, where the core of moral particularism seems to be reduced to the negative epistemological thesis that denies the possibility of universalisation. This thesis should not be confused with the argument of 'the context sensibility of reasons', which is not a prerogative of moral particularism, since it is also embraced by several universalist accounts, see e.g. William David Ross theories of prima facie duties and of logic of defeasible norms. See at least William D. Ross, The Right and the Good, Oxford University Press, Oxford, 1930.

[25] This is the core thesis of expressivism/emotivism: it is a thesis that semantically complements non-cognitivism in meta-ethics since it is strictly connected with the ontological denial of the existence of moral facts.

c) Referring to the context of justification, Guastini does not compromise himself with any model of practical reasoning (normative or descriptive). Therefore, we have no elements to define his theory as "particularist" in this respect.

d) Referring to the structure of a constitutional review, when Guastini says that judicial balancing consists of establishing an *ad hoc* axiological hierarchy between the principles in conflict he absolutely does not mean in any way that this hierarchy always has legal validity only for a particular or an individual case[26]: indeed, it can be valid for a class of cases: the point is strictly contingent and empirical[27].

In short, "particularistic" seems to me to be truly an inadequate label for this first theory of balancing.

2. The emotivist account of value judgements embraced by the well-known Italian legal theorist has been seriously criticised by other legal theorists**,** but the aim of the objections is never to deny the validity of his descriptive theory. Actually, they can be considered both: a) an invitation to abandon the methodology of a *wert-frei* descriptive legal theory; and b) the expression of deep discomfort in respect to his emotivist account of value judgements, which has never been seriously attacked by any of those critics. For these reasons, they are not relevant for the purposes of our discussion. I do not want to claim that emotivism provides the best account of our practical reasoning, nor that it offers the best semantic thesis on the nature of propositions of value[28]: there are

[26] Riccardo Guastini, Interpretare e argomentare, cit. at 207

[27] Moreover, Guastini's theory of balancing is a descriptive account whose empirical basis is constituted by the decisions of constitutional courts belonging to civil law systems (mainly the Italian Constitutional Court): it is well known that the majority of these courts are generally empowered to rule on the constitutional legality of statutes and to declare their inefficacy erga omnes: for this reason, their way of balancing should be considered categorical by definition: it is always relative to a class of cases, and never to a single case. This point is so obvious that it was never made explicit by Professor Guastini before 2011.

[28] In the last decade, semantic relativism has provided the best account of the nature of propositions of value, maintaining that they have truth-values whose verification parameters depend entirely on subjective or inter-subjective standards of evaluation. Using this semantic: i) it is possible to explain how value propositions fit truth-functional contexts (i.e. modus ponens, negation and disjunction); ii) it is also possible to explain the phenomenon of disagreement without the need to postulate any cognitive error, and without the need to embrace some form of objectivism. When the standard of evaluation changes the truth-value also changes. In short, using semantic relativism, we both keep the intuition of expressivism and correct its main problems. However, we have to be careful: relativism should not be confused with contextualism. The relativist approach 'relativises' the extension, but not the intention. In other words, the evaluation circumstances are entirely determined by the agent's interests. Conversely, contextualism relativises the intension of the proposition, which becomes context sensitive: the logical form of the proposition is 'saturated' by the contextual variables. It is exactly on this point that contextualism has to face its worst enemy: the proliferation of variables (how many variables can be put inside the context?). On this specific problem that affects propositions expressing

other forms of moral subjectivism which are definitely more sophisticated. All I want to claim is that, among legal theorists generally, and among the critics of Riccardo Guastini in particular, nobody has presented a sound argument against emotivism.

3. It is clear enough that in this first theory there is no room for a conception of judicial balancing as a form of *conciliation* between two conflicting principles. It has been said that the *idea* of some sort of conciliation can only be given by a diachronic series of different balancing operations, having the same principles as their objects. The idea of conciliation between two principles within a single balancing operation is nonsensical[29]. I think that this is not entirely correct: in fact, the *idea* of some conciliation can also be given: (i) by the introduction of an explicit exception in the norm-product of balancing; and (ii) by a series of balancing operations within the same constitutional judgement, where the priority is sometimes given to one principle, sometimes to another (*infra*).

4. At this point, some doubts should arise in our minds: in Professor Guastini's account, are principles really 'applied' or are they simply used as general value judgements – made by the legislator or by the constituent assembly – which can be presented in order to justify the formulation of implicit norms, and these and only these implicit norms are truly 'applied'? In other words, does a principle really work as a norm, or does it represent just a reason[30] (or, if you prefer, a "pre-construed argumentative structure"[31]) that can be invoked to justify the production of new norms? In many of his works, Riccardo Guastini has specified that principles cannot be directly applied through syllogistic reasoning: in order to be applied, they need a previous "concretisation". "Concretisation" can

value judgements, see at least: Max Kölbel, Expressivism and the Syntactic Uniformity of Declarative Sentences, in "Critica: Revista Hispanoamericana de Filosofía", Vol.17, No.87 (1997) 2; Massimiliano Vignolo, Use against Skepticism, Cambridge Scholars Publishing, Newcastle, 2009; Mark Shroeder, Being For: Evaluating the Semantic Program of Expressivism, Oxford University Press, New York, 2010; and Walter Sinnott-Armstrong, Moral Scepticisms, Oxford University Press, New York, 2010. On the difference between contextualism and relativism, see at least: Claudia Bianchi, La dipendenza contestuale. Per una teoria pragmatic del significato, Edizioni Scientifiche Italiane, Napoli, 2001; Herman Cappelen & John Howthorne, Relativism and Monadic Truth, Oxford University Press, Oxford, 2009; Max Kölbel - M.C. Carpintero (eds), Relative Truth, Oxford University Press, Oxford 2008; Francois Récanati, Direct Reference: From Language to Thought, Blackwell, Oxford, 1993.

[29] Riccardo Guastini, Interpretare e argomentare, cit. at 209.

[30] More precisely, principles considered as reasons for norms, not as reasons for actions. Principles are construed as reasons for action in Joseph Raz, Practical Reasons and Norms, London, 1975, 15, 58.

[31] See Roberto Bin, Diritti e Argomenti. Il bilanciamento degli interessi nella gurisprudenza costituzionale, Giuffr , Milano, 1992.

thus be defined as an operation which is generally non-logical, where a first explicit norm constitutes the premise or, more often, one of the premises and a second implicit norm constitutes the consequence. I think it is correct to say that the second norm is a concretisation of the first norm if and only if: (A) the second implicit norm has a lower degree of indeterminacy compared to the first norm; (B) the second implicit norm qualifies the first one in a substantive way; and (C) there is some (even broad) relationship of relevance between the two norms: this relationship does not have to be a relation of logical implication and typically is not logical at all, but merely argumentative – that is a boundary which is carried out using rhetorical devices. As it can be easily understood, this concept of concretisation is really similar to the one proposed by Hans Kelsen[32]. Its structure is also very close to a form of practical reasoning labelled "specification" by ethical theorists, and that has been recently used by Professor Mauro Barberis[33] to describe the role of principles in current legal systems (*infra*)[34].

In Riccardo Guastini's work there is (more or less) an explicit connection between judicial balancing and what we have just called "the concretisation of principles". The operation of balancing – as defined by the Italian professor – is insufficient to make a principle applicable: on the contrary, balancing seems to be an eventual phase that preludes an operation of concretisation. In my opinion, Riccardo Guastini is completely right on this point although he sometimes seems to slightly underrate the effects of the link between judicial balancing and concretisation. It is very important to point out, as Professor Guastini correctly does, that a principle can be used even without balancing: in fact, this is what happens whenever a judge, using a strict "monistic" strategy, does not identify (meaning: create) and solve any conflict between two principles, but simply specifies the normative content of a sin-

[32] See, e.g., Hans Kelsen, General Theory of Law and State, Cambridge, Cambridge University Press, 1949 at 135.

[33] See Mauro Barberis, Europa del diritto, Il Mulino, Bologna, 2009, last chapter; Esiste il neocostituzionalismo, in Analisi e Diritto 2011, Paolo Comanducci e Riccardo Guastini (eds), Marcial Pons, Madrid, 2011, 11-30.

[34] See at least: Henry S. Richardson, Practical Reasoning about Final Ends, Cambridge University Press, Cambridge-New York, 1997, in particular Chapter IV; David Wiggins, Sameness and Substance Renewed, Cambridge University Press, Cambridge-New York, 2001, Second Edition; Elijah Millgram, Ethics Done Right, Practical Reasoning for a Foundation of Legal Theory, Cambridge University Press, Cambridge-New York, 2005. The word "specificationism", instead, is generally used to denote: i) the practical strategy of solving every ethical conflict through the specification of norms; and ii) a meta-theory which aims to develop the metaphor of specification into a meta-model that promotes a better understanding of ethical models.

gle principle which is considered the only one enforceable[35]; it is both possible and correct to maintain that balancing is conceptually separated from concretisation. However, it should be stressed that:

a) Those judicial operations which are commonly described in terms of 'balancing' by jurists never consist of the mere establishment of an axiological order: this first intuitive operation always precedes a subsequent activity, namely the specification of the normative content ascribable to the constitutional prevailing principle. Most of the time there is a deep interaction between these two operations, and sometimes they even become inextricably inter-connected. Balancing never walks alone: it always goes hand in hand with this form of specification.

b) When concretisation is combined with balancing, it can also work in a different way than when it is used alone, at least in the argumentation process (which belongs to the sphere of phenomenology): the principle left aside can be used as a reason to justify the formulation of explicit exceptions to the norm which is the product of balancing, or as a reason to consider non-constitutional only a part of the set norms that can possibly be the object of the constitutional review[36].

If we take into account the strict interactions between balancing and the operation we have defined as concretisation, we can also 'save' two basic ideas that lie behind the metaphor of 'balancing', which are probably to be rejected otherwise: the idea of equity and the idea of compromise. In Guastini's descriptive account, judicial balancing is never a compromise between two principles: it is always an act of giving full priority to one of the principles at stake. The idea of some sort of conciliation can only be given by a series of balancing operations[37], and not within a single decision. But the general understanding of law professors and practitioners is that judicial balancing can be either: i) an act of 'outweighing' or

[35] In this case, the cause of the defeasibility of the principle-norm is not rooted in a second principle but in the thelos of the same principle. It is a kind of 'internal – defeasibility'. On this point, see Giorgio Pino, Diritti e interpretazione, Il Mulino, Bologna, 2010, Chapter VI.

[36] See e.g. the following decision of the Italian Constitutional Court: Sent. 27/1975, and the following decisions of the Supreme Court of the United States of America: Tennessee v. Garner 471 U.S. 1 (1985) (Warren E. Burger, J.). Generally speaking, abortion cases provide good examples for this thesis.

[37] A good example can be found in the decisional strategy of Justice Powell: in Gannett Co. v. De Pasquale, 433 U.S. 268, (1979) 440-46 he gave precedence to the right to privacy – formulating a rule that denies media access to pre-trial proceedings – just because in the previous Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) precedence had been given to free speech, protecting the press against 'gag orders'.

ii) an act of 'striking a balance'[38].

In my opinion, a sort of 'compromise' between the principles can be reached even within a single decision: not in the operation of deciding which norm should prevail – as Guastini correctly maintains – but in the concretising operation that then follows. Here, the principle that has been put aside can be used as a reason (namely, a rhetorical argument) to justify a full series of exceptions to the rule which concretises the prevailing principle, or to consider only some parts of the normative statement(s) under review as non-constitutional, while still holding the others constitutional. I use the expression "idea of compromise/conciliation" instead of "compromise/conciliation" for two reasons: i) it is a vague concept whose core is constituted by the idea of some sort of equilibrium between two opposite poles; and ii) it can be a predicate of principles only in a metonymic sense since it is only a proper predicate for the opposite interests that are 'covered' by the principles at stake.

Between the enforcement and the non-enforcement of a principle, there is an intermediate hypothesis: the principle can be partially enforced. This is evident if we adopt both a 'dynamic'[39] and a 'static'[40] theory of rights[41]. Ultimately, a judge can decide to put aside an indefinite series of specifications of the constitutional right, but this does not entail the whole right being sacrificed. Judicial balancing was created as a tool for flexibility: it was created as a means to avoid the legislative rigidity that leads a judge to protect only one interest at a time, and to realise a compromise

[38] On this distinction, see Alexander Aleinikoff, Constitutional Law in the Age of Balancing, in "Yale Law Journal" Vol.96, 1987, 94-1005.

[39] See e.g. Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays, Yale University Press, 1919 and Carl Wellman, Real Rights, Oxford University Press, Oxford, 1995.

[40] See e.g. Jeremy Waldron, Rights in Conflict, in "Ethics" No. 99 (1989) at 503; Neil MacCormick, Rights, Claims and Remedies, in "Law and Philosophy" No.1 (1982) 337 and Joseph Raz, The Morality of Freedom, Oxford University Press 1986.

[41] In 'static' theories, rights are conceived either: i) as an elementary normative position; or ii) as an aggregate of elementary normative positions built around a core, which is constituted by one of these elementary positions, and which we assume to be an essential property of the right. On the contrary, in 'dynamic' theories of rights, the right is considered as reason to justify the attribution of an ever-changing series of elementary normative positions. On this distinction, see: Carl Wellman, An Approach to Legal Rights: Studies in the Philosophy of Law and Morals, Springer, 1997, and Mauro Barberis, Etica per giuristi, Laterza, Roma-Bari, 2006. Mauro Barberis suggests that these two theories are not incompatible because they deal with different objects. To be sure, 'static theories' deal with rights qua elementary normative positions or sets of elementary normative positions, while 'dynamic theories' deal with rights qua reasons to assign an elementary position to a subject; in the dynamic theories norms are conceived as arguments or meta-meta-norms.

among the interests at stake, case by case[42]. Obviously, no compromise can be reached in the act of choosing which principle should prevail, and then be applied: this is nonsensical. It is also clear that "balancing" is not simply a synonym of "conciliation", and that we face balancing operations which consist of giving full priority only to one of the conflicting principles. Nevertheless, a 'residue' of the discarded principle can be detected in the exception(s) to the rule that gives application to the higher principle, or in some norm that represents the concretisation of the principle left aside. The protection of a legal right can be limited so long as the *core* of the right is not undermined (otherwise, if the core is undermined the possibility of the right being protected is simply excluded). There are several grades and ways to compress a right: they lead to *non-enforcement* only when the exercise of the right is severely frustrated or has become impossible. Obviously, it is really hard to identify the core of the right and to "sharply separate the contents from the means"[43]. Most of the time, means and contents are confused, but there is still the conceptual possibility to trace this distinction. American jurisprudence has tried to develop several tools to accomplish this task: e.g., in First Amendment Theory it is common to distinguish between 'direct' and 'indirect' interventions in limiting a right: the former are generally subjected to *strict scrutiny*. These distinctions have mostly introduced merely empty formulations; in any case this statement does not falsify the claim that constitutional rights do have different grades of implementation.

5. In conclusion, I think that, if we want to give a full account of the strict relationship between balancing and concretisation, it could also be possible to conceive judicial balancing as a particular kind of concretisation process, a hybrid form of legal reasoning formed by (at least) three different operations: i) the intuitive value judgment of precedence; ii) the concretisation process; and iii) the final subsumption. These three operations are normally preceded by the choice of two conflicting covering principles, via prima facie interpretation, and by a previous 'double subsumption'. The operations in (i) and (ii) are connected in the way I have just shown. In all honesty, I do not know if this hybrid model can

[42] See Roscoe Pound, Justice According to Law, in "The Mid-West Quarterly" Vol.1 No.3 (1914) 223 and A Survey of Social Interests, In "Harvard Law Review" Vol.17 No.1 (1943) 1.
[43] See Roberto Bin, Diritti e argomenti, cit. at 102.

be considered 'better' than the one adopted by Guastini – whereby concretisation and balancing are logically separated – since it is a quandary concerning the aesthetic qualities of the models.

3. Professor Moreso: Judicial balancing between logicism and objectivism

Professor José Juan Moreso has recently proposed a theory of balancing based on the distinction between defeasible and indefeasible norms, and on a certain conception of the revision of defeasible norms. According to this second theory of balancing, the apparent conflict between rights can be settled through a refinement of constitutional worlds. The tools used by Professor Moreso in his theoretical account are mainly taken from Carlos Alchourrón's famous works on the logic of defeasible conditionals[44]. The five arguments that characterise this second theory of judicial balancing are as follows: i) the compatibility between judicial balancing and subsumption; ii) the rejection of the particularist conception of practical reasoning; iii) the definition of balancing as a form of specification; iv) the definition of specification as a logical operation of refinement of the antecedent of the norm; and v) the conception of concretisation as an intellectual operation framed by objective moral truths and paradigmatic cases. On one hand, judicial balancing is described as a logical operation that judges realise before subsuming a fact under a general norm – an operation that makes subsumption possible even when we are dealing with norms affected by a high level of vagueness. On the other, particularism is heavily criticised; an alternative view is proposed, a view that pushes its way through the ideal revision of principles – namely, the specification of all the properties of the case which are potentially relevant.

This second theory can thus be regarded as an attempt to offer a form of balancing which can be controlled rationally – through a conception of legal principles as defeasible norms. We can easily imagine the ideological reason that lies behind this effort: the aim is to arrange the constitutional values in a coherent and harmonic order.

[44] Carlos E. Alchourrón, Law and Logic, in "Ratio Juris" No.9 (1996) 331; Para una lógica de las razones prima facie, in "Análisis Filósofico" No.16 (1996) 113.

Professor Moreso thinks that whenever two constitutional principles collide, the judge *should* reconstruct them, instituting a conditioned hierarchy, which can be the object of a *universalisation process*. Let us take an example to clarify the meaning of this statement[45]. Suppose we have two principles: the first (P1) protects the freedom of expression while the second (P2) protects the right to privacy. It is quite clear that conflicts between these could arise, in some concrete cases. When this happens, we should reconstruct the two principles in a way that both: i) solves the concrete conflict; and ii) establishes a rule that is valid for future cases. It is possible to consider the following two properties as relevant: the public importance of the news (C1) and the truthfulness of the news (C2). In this way, we obtain four elementary cases since the universe of cases (UC) – which is constituted by the whole set of elementary cases – can be constructed starting out from the universe of properties (UP) – which is the set of the relevant properties – using the formula 2^n, where "n" stands for the number of properties of the UP[46]. At this point, it is possible to recast the two constitutional principles (P1 & P2) as follows: "free speech is protected when the news is of public interest and it is also true" (N1) and "it is forbidden to infringe the right to privacy using the medias, except when the news is of public relevance and it is true". In this way, we can obtain a normative system which – according to Professor Moreso – regulates in a *coherent* and *complete* form all the possible cases of the UC we refer to. The Spanish legal theorist is aware that the procedure of universalisation involves at least one huge inconvenience: the specification of *all* relevant properties. In order to identify the relevant properties an adequate *thesis of relevance* is necessary[47]. But it seems always possible to refute *any* formulation of *any* thesis of relevance, claiming that the considered ones are not the only relevant properties of the case: there are other relevant properties (*infra*). This problem, which has been pointed out by Bruno Celano[48], is not considered insurmountable by Professor Moreso; in his opinion, there is a way out. First of all, consti-

[45] This is a simplified version of the example given directly by Professor Moreso in his works.
[46] See Carlos E. Alchourrón and Eugenio Bulygin, Normative Systems, Springer-Verlag, Wien-New York, 1971, Chapter I.
[47] On the thesis of relevance, see Carlos E. Alchourrón and Eugenio Bulygin, Normative Systems, at 103
[48] Bruno Celano,'Defeasibility' e bilanciamento. Sulla possibilit di revisioni stabili, in "Ragion Pratica", No.18 (2002) 223.

tutional courts generally operate with a limited set of properties, not an infinite set of properties; secondly, if we realise that there is a new relevant property that we had not previously taken into account, we will just have to use a second UP which has a more complex structure or, in other words, one which takes the new relevant property (or properties) into account. Going back to our example, it can be claimed that it is not right to allow the diffusion of a piece of news that contains insulting speech, even if there is a public interest and, at the same time, the news is considered to be true. The obstacle can be by-passed in the following way: a third relevant property – "the information contains offending words" – (C3) can be introduced in the former UP. With this operation, we can obtain a new universe of cases (UC_2) encompassing eight elementary cases, and a normative system which regulates them in a consistent and complete manner[49]. Moreover, Professor Moreso tells us that this operation is not only conceptually possible, but it is a good representation of what normally happens in real life when judges use the technique of distinguishing, taking into account new properties that were not considered in the previous case(s). To conclude, the new universe of cases (UC_2) will be more *refined*.

Written constitutions are sometimes described as folders of a set of conflicting principles; in the face of such a quandary, Professor Moreso's response is that this vision simply corresponds to an intuitive and *prima facie* understanding of the constitution – to a *Master book,* using the Alchourrón lexicon. All constitutional principles can be reformulated and restructured in a general scheme that provides univocal solutions to individual cases. On a 'deeper level of understanding', the constitution can be conceived as a *Master system* (still using the Alchourrón lexicon), namely a normative system providing complete and coherent solutions for all cases. Thus, it is possible to accomplish operations to subsume individual cases in a general case. Probably, we will have to face some indeterminacy caused by a kind of *incommensurability* that affects some of the values which underpin the constitutional principles, but this kind of indeterminacy can be treated as a form *vagueness*, namely a type of semantic indeterminacy; it is not necessarily a symptom of a deeper form of fragmentation of values,

[49] José Juan Moreso, A proposito di revisioni stabili, casi paradigmatici e ideali regolativi: replica a Celano, in "Ragion Pratica", No.18 (2002) 241.

nor it is proof of their entirely subjective and emotional nature. On this point, Moreso's position does not seem very clear to me. Moreover, the validity of the propositions: (A) 'the indeterminacy is due to value incommensurability'; and (B) 'the incommensurability can be treated as a form of vagueness' is not proven, but assumed in a dogmatic way. However, judicial balancing – as so defined – can be made compatible with logical subsumption. In Moreso's theory, the subsumption of a particular case under a general norm is considered a necessary presupposition of all rational practical deliberations. In partial contrast to Robert Alexy (*infra*), Moreso conceives balancing not as the activity of weighing the principles in a quantitative way, but as the activity of tailoring the principles to a class of cases or, in other words, to make the principles more specific[50].

In this second account, the procedure of judicial balancing is described as *non-arbitrary* since it is constrained by two limits: a) our *basic (moral) intuitions* (*intuiciones básicas*); and b) *paradigmatic cases* – that is to say those concrete cases of conflict not affected by indeterminacy and which constitute the *core* of the constitutional right[51]. In Moreso's conception of balancing, these two elements must be seriously taken into account to build up stable hierarchies that can thus be considered valid. In all honesty, I think that 'paradigmatic' should be considered a predicate that is attributed to the element 'case' through an evaluative process based on some normative standard. It should be reminded that in the community of jurists there is no perfect agreement on which cases should be considered 'paradigmatic', and the possibility of obtaining an objective-paradigmatic case depends on the possibility of having objective standards of evaluations. For this reason, in my analysis I will not consider the two constraints as independent.

Let me sum up. The constitutional judge ideally operates using a limited set of relevant properties. Judicial balancing consists of *making explicit the implicit content of a right*: it is the process of specifying principles through the formulation of a set of rules, linking the properties of the UD with the corresponding normative

[50] See José Juan Moreso, Ways of Solving Constitutional Rights: Proportionalism and Specificationism, forthcoming in "Ratio Juris" 2012.
[51] See e.g. José Juan Moreso, Conflitti tra principi costituzionali, in "Ragion Pratica", No.18 (2002) 201, at 202-206; A proposito di revisioni stabili, casi paradigmatici e ideali regolativi: replica a Celano, cit., at 245.

solution. Using this logical process of reinforcement of the content it is possible to obtain a set of derivative rules; these norms, considering further relevant properties, determine a refinement of constitutional worlds. Judicial balancing does not necessarily have to be irrational: it can be conceived as a logical process. Moreover, the 'correct answer(s)' can be identified in most cases, using paradigmatic cases and shared moral intuitions. Obviously, this is what happens in *ideal conditions*[52].

I will try to analyse this theory, focusing on its problems and leaving aside its priceless merits. However, before going through this process it is essential to formulate a couple of preliminary considerations and caveats:

1. This account expressly represents judicial balancing as a particular kind of concretisation. Moreover, it clearly gives priority to the specification process over balancing as a characterisation of principled reasoning. Obviously, I have no quarrel with these ideas. I shall only add a couple of warnings: a) I am aware that this is (mainly) a normative theory, but if we define concretisation as a logical operation, the theory will lose a great part of its explicative force – a property required even in a normative theory: as it is carried out by constitutional judges, the process of specifying the normative content of constitutions cannot be properly described as a reinforcement of the antecedent, at least in most cases; and b) in Moreso's account, the operation of choosing which principle should prevail ("weighing", or "balancing" in the strict sense) is partially missed out, or at least severely obscured by the stress put on the concretisation process, the ideal of coherency and by the classification of conflict between constitutional rights as *prima facie* (that is, apparent) conflicts[53].

2. The concepts of "basic intuitions" and "paradigmatic cases" represent the greatest exegetic problems we encounter in the analysis of Moreso's theory: a) when he discusses judicial balancing, he never offers any definition of "basic intuition", even if he gives a few examples where basic moral intuitions are represented as substantive principles which are both auto-evident and true[54]; b) conversely, when he defends moral objectivism, he moves along

[52] Id.
[53] Id.
[54] See note 46.

the lines of a dispositional doctrine[55] grounded on moral *platitudes,* namely a short number of trivial moral truths which are implicit in our moral practice. Moreover, his position on value judgements seems to swing: i) between a form of strong empirical intuitionism and a peculiar form of comprehensive and 'weak' moral constructivism – which Moreso calls "ecumenical" ; ii) between a descriptive and normative meta-ethic; iii) between an empirical and a purely rational justification of moral intuitions; and iv) between non-realistic objectivism and moderate subjectivism.

I think that the best thing to do, in accordance with the principle of interpretative charity, is to make two possible interpretations of Professor Moreso's position. My proposal is to consider him as either: i) an empirical intuitionist: "basic intuitions"[56] shall be considered then as a concept used to describe a set of propositions which are auto-evident (and true) and substantially determine our practical reasoning – "paradigmatic cases" are objectively determined by these propositions; or ii) a "minimal" moral constructivist: "basic intuitions" is used to refer to only four or five properties which are trivial and conceptual truths: some of them are not even moral principles *stricto sensu*; all of them, taken together, are by no means capable of significantly determining the frame of the possible outcomes since they are just trivial consideration about morals (*infra*)[57]. In both cases, the objectivity of val-

[55] «[MC] x es moralmente correcto si y solo si los seres humanos ante el acto x, en condiciones ideales, tendrían una pro-actitud hacia la realización de x.» in José J. Moreso, "El reino del los derechos y la objetividad de la moral", in La Constitución: modelo para armar, Marcial Pons, Madrid, 2009 at 78.

[56] This first interpretation can be suggested, e.g., by this long passage: «Sin embargo, tampoco es necesario asumir que carecemos absolutamente de criterios para establecer la jerarquía, dadas determinadas circunstancias. Publicar una noticia falsa, sin ninguna comprobación de su veracidad, relativa a la vida privada de una persona y lesiva para su honor (e.g., que un obispo o un ministro del gobierno o un profesor de Universidad, es miembro de una red que se dedica a la prostitución infantil) es un supuesto en que la libertad de información cede ante el derecho al honor. Publicar la noticia verdadera de que, e.g., un ministro del gobierno ha cobrado diez millones de dólares de cierta empresa para construir una autopista, es un supuesto en que la libertad de información desplaza al derecho al honor. Aquellas reconstrucciones de estos derechos que non den cuenta de estas solidas intuiciones, pueden considerarse reconstrucciones inadmisibles. La admisibilidad de una reconstrucción depende, entonces, de su capacidad de dar cuenta de los casos paradigmáticos. Las dudas sobre como ordenar los principios en casos de conflicto ocurren en un trasfondo, a menudo inarticulado, en el cual intuitivamente acordamos en solución de tales conflictos para determinados casos que, de alguna manera, son obvios para nosotros.» José J. Moreso, "Conflictos entre principios constitucionales", in La Constitución: modelo para armar, cit.

[57] This second interpretation can be suggested, e.g. by José J. Moreso, "El constructivismo etico y el dilemma de Eutifron" and "El reino de los derechos y la objectividad de la moral", both in La Constitución: modelo para armar, cit., where Professor Moreso explicitly embraces the theory proposed by Michael Smith in The Moral Problem, Basil Blackwell, Oxford, 1994 and makes several references to David Lewis, "Dispositional Theories of Values", in David Lewis, Papers in Ethics and Social Philosophy, Cambridge University Press, Cambridge, 1983, 68-93.

ues seems to have an empirical, *a posteriori,* basis, which stands partly apart from rationalism. I will not pick up one of these interpretations – that, in Moreso argumentation, seem to overlap, given their common ground; on the contrary, I will take both options into account. Obviously, there could be (at least) one further possible interpretation: we might consider the constraints on judicial balancing as the product of a contingent and always variable inter-subjective agreement: however, I will not consider this interpretation as an option since it clearly collides with Moreso's explicit adherence to moral objectivism and moral cognitivism.

At this point, we can ask ourselves if Professor Moreso's theory was able to realise its own ambitious purposes (to overcome the particularistic conception of balancing, to obtain a rule of conflict which is indefeasible, to permit rational control of the balancing process, to limit judges' discretion). I think that the answer to this question is *negative*, for the following reasons:

1. *It is impossible to reach an ultimate thesis of relevance (UTR) because a UTR requires objectivity and – in ethics – objectivity does not exist.* As Professor Celano has pointed out, the revised principle could, in turn, be revised again and again: it will always be more or less defeasible. This is a central issue: if Professor Moreso cannot demonstrate that revised principles are indefeasible conditionals, he cannot consequently prove it is possible to obtain stable hierarchies, nor at the ideal level: the objection still stands . In order to obtain a stable hierarchy we need an *ultimate thesis of relevance* (UTR)*,* namely a thesis of relevance which enables us to define in advance all relevant generic cases and their relative values: by definition, this thesis cannot be revised further. Professor Moreso maintains that: 1) even if we have to reject the hypothesis that a UTR within a macro-system is possible, we do not have to also abandon the idea that a UTR within a micro-system is possible; 2) in the real world constitutional judges generally work with a limited UP. He infers (from 1 and 2) that with (3) it is possible to have stable revisions in actual constitutional adjudication. I will try to reject his argument.

Even within a micro-system, the selection of relevant *properties* depends on epistemic and ethical parameters that are a product of value judgements; then, both the possibility of a UTR and the possibility of stable constraints in the process of balancing rely on the possibility of having ultimate values that are somehow ob-

jective. Moreso maintains that a judge cannot proceed arbitrarily in the refinement process because there are at least two series of objective limitations: in ideal conditions, the specification process will have to face the constraints given by our basic moral intuitions, which are to be considered as the very grounds for stable selection parameters.

In this work, I do not want to claim that the formulation of a UTR is *conceptually impossible* (even if this thesis seems to me quite plausible, it is highly controversial in the philosophical debate): all I wish to say is that it is unrealistic to think that human beings can generate a UTR, even in ideal conditions, just because the possibility of a UTR depends on the possibility of having ultimate values which are objective, whereas value judgements are essentially subjective. In this paper I will not provide a full and strong defence of moral scepticism and moral subjectivism. Instead, I will provide a weak defence, showing how the idea of moral basic intuitions is highly implausible and how dispositional theories are highly problematic. The source of all the fallacies that affect these two (sometimes overlapping) positions relies on a mistaken conception of the structure of the human mind.

2**.** *If we want to consider Moreso's claim as a form of empirical intuitionism (namely, a descriptive meta-ethic), then it is possible to criticise his position showing that the existence of a "moral intuition" is highly implausible.* The current trend in philosophy of law is to 'buy' in a more or less acritical way some sort of moral objectivism; therefore, the topic of value judgements is not often discussed anymore among legal theorists and is largely considered an *old-fashioned* discussion.

The implausibility of moral intuitionism was already evident after the powerful arguments developed by authors such as Alf Ross[58], Peter F. Strawson[59] and John L. Mackie[60]; it has now become even more evident thanks to a series of empirical studies in the field of moral psychology and rational decision theory. The core of empirical intuitionism is constituted by an epistemological thesis: the belief that some of our moral beliefs are justified without needing to be inferred from any other beliefs. These ultimate be-

[58] Alf Ross, On the Logical Nature of Propositions of Value, cit.
[59] Peter F. Strawson, Ethical Intuitionism, In "Philosophy", Vol.24, No.88 (1949), 23.
[60] John Mackie, Ethics, Inventing Right and Wrong, first published in Pelican Books, London, 1977, reprinted in Penguin Books, London, 1990, Chapter I.

liefs are considered self-evident and, many times, true: they are considered "so luminous that one cannot grasp them without believing them"[61], although most of the time these absolute qualities can only be reached on limited and (sometimes) even complex bases. However, the ultimate justification rests on a mysterious faculty of human beings[62]: a cognitive and non-inferential response to the relevant object; this 'faculty' is not necessarily unreflective and does not have to be something distinct from our general rational capacity; nor does it have to be indefeasible[63].

The fact that this epistemological claim is highly implausible can be easily demonstrated by the conjunction of three theses[64].

a) The first thesis is very famous and generally known as *the argument from relativity.* It is the *anthropological* consideration that both the moral codes and the differences in moral beliefs have always varied between different groups or classes within a complex community. These phenomena are more readily explained by the hypothesis that they reflect relative and subjective values, rather than by the hypothesis that they express perceptions of objective values and that, most of the time, these perceptions are even distorted. The existence of a property called moral intuition, which enables us to capture the form of these objective values, does not then seem very plausible.

b) The second thesis is also well known; it is sometimes called *the argument from queerness*; it is mainly an *epistemological* argument. If there were objective values, they would be really strange entities. The truth of these entities, their cogency, and their function as premises in our practical reasoning cannot be grasped by any of our ordinary accounts of our perception, or by any logical analysis: it rests only upon a strange property called 'moral intuition'. But this is a queer explanation of moral knowledge. It would be much simpler to replace moral qualities and moral intuitions

[61] See Robert Audi, Moderate Intuitionism and the Epistemology of Moral Judgement, in "Ethical Theory and Moral Practice", Vol.1, No.1 (1998) 15, at 17.

[62] I am aware that this is just one possible definition of moral intuitionism, and that this definition cannot capture all the different kinds of moral intuitionism. However, I have adopted this definition here for three reasons: 1) it captures the weakest form of intuitionism that is strong enough to deny the infinite regress problem of moral skepticism; 2) it represents moral intuitionism as a thesis on beliefs and not on knowledge; and finally, and most importantly, 3) it seems to me the best definition of the kind of intuitionism that is expressed in one of the possible interpretations of Moreso's posture on values.

[63] See Robert Audi, Moderate Intuitionism and the Epistemology of Moral Judgement, cit. and The Good in the Right, Princeton University Press, Princeton, 2004.

[64] The best account of the first two arguments is provided by John Mackie in his masterpiece Ethics, Inventing Right and Wrong, cit, Chapter I, paragraphs 8-9. Here, I will basically follow him.

with some kind of subjective response, which has a causal relation to the perception of some natural feature.

c) The third one can be called *the framing-effects and biases argument,* which is an *empirical and psychological* argument. It has been developed in the last 35 years and has been used directly against moral intuitionism in some recent works of moral philosophers, such as those by Walter Sinnott Armstrong[65]. Sometimes it is used in broader attempts to debunk ethics and to develop the discipline of moral psychology. The claim is that our moral beliefs cannot be non-inferentially justified because our moral intuitions are subject to so-called 'framing psychological effects' and to subject biases. Our moral beliefs are formed in circumstances where either we are partial, there is a disagreement and we do not have any meta-criterion of preference, the judgement is clouded by our emotions, the circumstances 'are conducive to illusion', the source of our belief is disreputable or unreliable. This claim is supported by behavioural studies and a series of recent experiments in neuroscience using recent developments in functional magnetic resonance imagery (fMRI), which is a method of mapping the synaptic pathways that induce emotional states[66].

3. *If we want to consider Moreso's position as a form of minimal constructivism (namely, a normative and conceptual meta-ethic), then we can maintain that: a) it does not offer any sound argument for the rejection of moral relativism and scepticism; b) in order to avoid the objection of circularity, his theory brings back the problems of moral intuitionism; and c) in any case, it does not provide substantive constraints on judicial balancing.*

a) As Professor Celano has pointed out[67]: i) José Juan Moreso

[65] See Walter Sinnott-Armstrong, Framing Moral Intuitions, in Walter Sinnott-Armstrong (ed.) Moral Psychology, Vol. II, The Cognitive Science of Morality: Intuition and Diversity, MIT Press, Cambridge, 2008, 47; How to Apply Generalities: Reply to Tolhurs and Shafer-Landau, in Moral Psychology, cit., 87; Moral Intuitionism Meets Empirical Psychology, in Terry Hogan and Max Timmons (eds), Metaethics After Moore, Oxford University Press, New York, 339.

[66] See Alice M. Isen & Paula F. Levin, Effect of Feeling Good on Helping: Cookies and Kindness in "Journal of Personality and Social Psychology", No.21 (1972) 384; Joshua D. Green et al., An fMRI Investigation of Emotional Engagement in Moral Judgement, in "Science", No.293 (2001) 2105. Kihn Luan Phan et al., Functional Neuroanatomy of Emotions: A Meta-Analysis of Emotion Activation Studies in PET and fMRI, in "Neuro Image", No.16 (2002) 331; Tomas Nadelhoffer and Adam Felz, The Actor-Observer and Moral Intuitions: Adding Fuel to Sinnott-Armstrong's Fire in "Neuroethics" Vol.1 No.2 (2009) 13; Daniel Kahneman, Paul Slovic, Amos Tversky (eds), Judgement under Uncertainty: Heuristics and Biases, Cambridge University Press, Cambridge, 1982; Daniel Kahneman and Amos Tversky, Prospect Theory: An Analysis of Decision under Risk, in "Econometrica", Vol.47 No.2 (1973), 263.

[67] See Bruno Celano, Commenti a José Juan Moreso El reino de los derechos y la objectividad de la moral, in Enrico Diciotti (ed.) Diritti umani e oggettivit della morale, DiGiPs Universit di Siena, Siena, 2003, 41-85 at 40-44.

criticises moral scepticism claiming that this theory does not explain the existence of some moral platitudes in the grounds of our folk morality. However, since moral scepticism shall be defined as the theory that rejects the very existence of moral platitudes, claiming that our moral practice is incoherent, contradictory, deceptive and fragmented, Moreso's central argument against moral scepticism is circular. ii) Moral relativism is criticised insofar as it implies foundationalism, but this implication is absolutely false. iii) Moreover, Moreso also admits that his "ecumenical theory" does not offer any sound objection to moral scepticism and relativism since it should be considered instead as an elusive defence to the sceptical arguments against moral objectivism[68], neither does he exclude the possibility that our morality is inexorably incoherent and illusive[69].

b) Generally speaking, dispositional theories are affected by circularity: their moral conclusions are just the consequences of the moral principles which are selected as the grounds for construction, and which are also justified by the theory itself; thus, they are generally unable to explain why human beings should act according to the precepts of the theory. Conversely, Moreso's dispositional theory attempts to solve the problem of circularity, but the proposed solution seems highly defective as it introduces a form of intuitionism in its basis. Therefore, the basic assumptions of "ecumenical objectivism" are grounded on a certain conception of the human mind: as Professor Celano has noted, in Moreso's account the epistemic accessibility of goodness is determined by *perception* and not by *cognition*: the access to an objective moral property occurs through a physical and biological process which is identical to the one required to access a secondary quality of material objects (e.g. colours). But, if that is so why then should human beings have a certain objective attitude toward a given object? This question leads to an infinite regress that can only be stopped by demonstrating that it is possible to have justified moral beliefs that are not inferred from any other moral belief; but

[68] «No pretendo ofrecer un argumento contra el escéptico. Pretendo, tan solo, esbozar los presupuestos de nuestra practica moral y afirmar que, si somos capaces de ofrecer un espacio conceptual capaz de abrazar dichos presupuestos, entonces tal vez podamos ignorar las dudas del escéptico.» in Constitución: modelo para armar, cit. at 75.

[69] «Es posible que nuestro análisis conduzca a la desesperanzada conclusión que nuestros usos conceptuales son irremediablemente contradictorios, o fallidos o confusos.» José J. Moreso, "El reino de los derechos y la objetividad de la moral", in Constitución: modelo para armar, cit., at 74.

this can only be demonstrated by showing that an objectivising perceptual property exists. As we have seen before (*supra*) this hypothesis is highly implausible.

c) Even if Professor Moreso's theory were valid, it could not offer any serious constraint on judicial balancing: the Court could still declare non-constitutional every law that clashes with the feelings of justice that belong to the majority of the judges. The five elements José Juan Moreso (following Michael Smith) considers as moral platitudes are incapable of substantially determining the outcome of a balancing procedure. i) It is quite evident that the *principle of practicality* (if I think that A is correct or right, then I have a pro-attitude for doing A) does not offer any serious constraint for the judges: it is not even a principle in a strict sense, because it is not action-guiding; ii) neither the *correctness claim* (if *x* thinks *that it is* correct to do A, and *y* thinks *that it is correc*t to not do A, then *x* and *y* have a genuine disagreement) can be considered as a normative principle. Referring to (iii) the *principle of supervenience* (if two human actions have all their relevant natural properties in common, then they should also have in common all their relevant moral properties); and (iv) the *principle of substance* (the actions that do not significantly affect the wellness of the other human being lack moral relevance), we can easily maintain that they do not work very well, provided that the argument of the inexistence of a UTR has not been rejected (*supra*) and, consequently, that we still do not have any objective parameter to establish when the wellness of a human being has been affected 'significantly'. Finally, even the principle that prescribes the procedure of *reflexive equilibrium* to solve ethical conflicts (v) does not offer any constraint on judicial balancing: considering that Moreso accepts the form of relativism given by value pluralism, he is forced to admit that: 1) there are different conceptions of what reflective equilibrium is; 2) these conceptions could lead to different and, most of the time, opposite solutions; 3) all of these solutions should be considered as correct; and 4) we do not have a meta-criterion to allow us to decide which one is better[70].

4. *It is unrealistic to think that constitutional judges operate with a limited UP.* If my interpretation of Moreso is correct, he thinks that: (A) it is possible to obtain stable solutions when we

[70] See Bruno Celano, Commenti a José Juan Moreso El reino de los derechos y la objectividad de la moral, cit.

operate with a limited series of relevant properties; (B) constitutional judges generally deal with limited series of relevant properties; he infers, from (A) and (B) the assertion (C) it is possible to obtain stable norm-products in constitutional balancing. The premise under (B) (constitutional judges operate with a limited UP) shall be considered as an empirical thesis, but it has not been proved and, in all frankness, I think that is completely false:

a) The first-level, or *prima facie*, normative system that constitutes the 'bridge' that connects the legal texts to the specified norms is a product of interpretation, which is a discretionary activity; b) the *Master System* is created through legal construction starting from a set of legal texts that, in most cases, have *almost no frame;* c) moreover, constitutional judges typically deal with hard cases which involve deep interpretive, theoretical and ethical disagreements; d) sometimes constitutional courts deal with individual cases (like in the Spanish *amparo*, or in other forms of direct recourses) but most of the time they deal with general laws and, sometimes, with legal texts that are strongly openly textured and thus have a wide set of potentially relevant properties, given the actual epistemic standards; and e) finally, if we are facing a condition of disagreement and our starting point is a *macro-system* or a *Master Book* constituted by a great number of conflicting and highly undetermined explicit norms (as Moreso admits), in the specification process of such a system *anything goes*. It will always be possible to refine the antecedent in at least two opposite ways.

If this is the state of the art, we may conclude that Moreso's balancing, even if it can be justified with a logical pattern, lacks rational grounding and ultimately rests on politics, arbitrariness and emotions.

3. Professor Alexy : Optimisation requirements and weighing formulas

Professor Alexy developed the first version of his famous theory of balancing in 1985[71]. Since then, his theory has been reformulated and specified in the course of time without changing its

[71] See Robert Alexy, Theorie der Grundrechte (1985), English translation: A Theory of Constitutional Rights, Oxford University Press, Oxford, 2002, at 76.

fundamental features. Currently, Robert Alexy is considered the greatest theorist of judicial balancing in the whole world: his celebrated "weight formula" has been increasingly used as an argumentative scheme worldwide. Generally speaking, we can qualify Alexy's theory of judicial balancing as *eclectic* in the following sense: using instruments taken from both linguistic analysis and the general theory of values he has developed a conception of judicial balancing which is essentially normative, but also partly descriptive of the methodology in use at the *Bundesverfassungsgericht*; moreover, this third theory of balancing is part of a wider doctrine of constitutional rights which embraces a form of moral objectivism and builds its ultimate foundations on the pure metaphysic of an existential-explicative justification. The primary scope of Alexy's theory is to prove the existence of a rational structure of balancing.

Professor Alexy inherited at least two distinctions from Ronald Dworkin: the distinction between rules and principles, and the distinction between hard and easy cases. The German professor claims that easy cases can be solved by rules, by means of subsumption, while hard cases must be solved using principles. Rules have the property of *all-or-nothing* applicability: they are definitive commands that can be applicable simply through subsumption; sometimes conflicts between two rules have to be faced, but they can be easily solved undermining the validity of one of the conflictive rules, or establishing a relationship of exception between them. By no means can we talk about degrees of legal validity. On the contrary, principles are *necessarily* conflictive and they are norms requiring that something be realised to the greatest extent possible considering the factual and legal possibilities; thus they are *optimisation requirements*: i) they can be satisfied to a variety of degrees; and ii) they are simply *prima facie* (or defeasible) requirements. Judicial balancing consists of determining the *appropriate* degree of satisfaction of a principle in respect to the requirements of the other(s)[72]. As we can understand, judicial balancing is required by the very nature of the principles: these are connected with *proportionality* by a relation of mutual implication that follows from the definition of principle; balancing is the third stage of the proportionality judgement. Then, proportional-

[72] See Robert Alexy, A Theory of Constitutional Rights, cit.

ity (and thus balancing) is conceived as the only possible form of application of legal principles[73].

Robert Alexy considers: (A) the distinction between rules and principles; and (B) the necessary connection between proportionality and judicial balancing as the core of what he calls "principle theory"[74]. In this descriptive-normative theory, balancing is depicted as a rational procedure: accordingly, the rationality of this process is essentially determined by three different elements: i) the objects of balancing: they should be principles (not values or interests); ii) the formal structure of the process of weighing principles as a mathematic formula; iii) the configuration of balancing as the third phase of a more complex form of argumentation, the proportionality judgement, whose first two elements (suitability and necessity) are also represented as optimisation requirements (Pareto efficiency requirements) and as real limitations on judges' discretion. The primary purpose of Alexy's theory is to offer a conception of judicial balancing as an intellectual activity, which can be submitted to rational control. There are good reasons to suspect that this aim is determined by a precise ideology: the justification of a deliberative conception of democracy and a defence of the institution of constitutional review.

The German legal philosopher conceives judicial balancing as a formal rule which allows a rational mediation between the constitutional system and the objective morality. Hence, he proposes a procedural theory of practical reasoning in order to obtain a *minimum* of discursive rationality in the constitutional review. Balancing is thus defined as the operation of establishing a relationship of priority between two conflicting constitutional principles; this operation generates a conditional norm (a rule) whose antecedent is constituted by the conditions of precedence established between the two principles; this rule can be obtained using the famous 'weight formula'. Moreover, the product of balancing is relative to the concrete case, but can eventually be universalised. Hence, in Alexy's opinion, the value judgement of balancing

[73] Id. at 66-69.

[74] See e.g. Robert Alexy, The Construction of Constitutional Rights, in "Law and Ethics of Human Rights", Vol.4 (2010) at 22: «[t]he distinction between rules and principles is at the heart of a theory that might be called 'principles theory.' The principles theory is the system drawn from the implications of the distinction between rules and principles. [...]The debate over the principles theory is, first of all, a debate over weighing or balancing—and, therefore, since balancing is the core of the proportionality test, a debate over proportionality analysis.» At 24: «The core of the principles construction consists in this necessary connection between constitutional rights and proportionality.»

is rational when it consists of the application of a rational rule by means of a mathematical formula. The rational rule is called the "Law of Balancing" and goes like this: «[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other»[75]. This law is structured as a three-pronged process: i) the first step is establishing the degree of non-satisfaction, or detriment, of the first element; ii) the second step is establishing the degree of importance of the second element; and iii) the third step is establishing if the importance of the second element justifies the non-satisfaction or detriment of the first principle. This process, as we have said (supra), is/should be applied in the third phase of proportionality by means of the 'weighing formula', which represents the counterpart to the classical deductive scheme[76]. The core of the weighing formula can be represented as follows:

$$Wi,j\ C = \frac{liC}{ljC}$$ [77]

Where: C stands for the properties of the concrete case; I_i stands for the intensity of the interference with the principle P_i; I_j stands for the importance of satisfying the competing principle P_j; $W_{i,j}$ stands for the concrete weight of the principle whose violation is being examined. The concrete weight is the quotient of the formula. The evaluation of the intensity of the interference and of the importance of the satisfaction can be realised using a quantitative scale formed by three levels: "light", "moderate", "serious"; it is possible, (and it is also strongly suggested) to assign numeric values to these levels (e.g., 1,2,3). This simple triadic scale can even be refined (e.g. we can adopt a double-triadic scale, composed by nine different values). The aim of the weighing formula is both to obtain some sort of maximisation between two conflictive principles and to give the best account of legal reasoning (we don't have to forget that Alexy does not believe in the Hume's Law). Obviously, Professor Alexy does not think that judges are so *freak* to weigh

[75] See Robert Alexy, A Theory of Constitutional Rights, cit. at 102.
[76] See Robert Alexy, On Balancing and Subsumption. A structural Comparison, in "Ratio Juris", No.16 (2003) 433, at 448.
[77] In this formula two orders of variables are still lacking: the abstract weights of the competing principles and the variables for the reliability of the empirical assumption concerning what the measure in question means in the concrete case for realisation/non-realisation of the principles at stake. As Giorgio Pino has pointed out, the role played by the abstract weight of the principles is really obscure. See Giorgio Pino, Diritti e Interpretazione, cit. at 194-199.

the constitutional principles using a calculator; nonetheless he is still convinced that this is the best possible explication of judicial balancing. This third theory is a paradigmatic case of procedural theory of balancing: judicial balancing is an operation that can be rationally justified and should be rationally justified from a formal point of view.

The products of balancing, in Robert Alexy's account, are defeasible norms: they establish an axiological order which is valid for the specific case, since it is denied that is possible to obtain a hierarchy that answers to all possible cases *a priori.* However, according to Robert Alexy's, this does not mean that we cannot get, after a long series of *ad hoc* balancing operations, a system of rules which are the specification of the meaning-contents of the constitutional norms. For this reason, his theory can be considered as an attempt to mediate between universalism and particularism. A few words ought to be made regarding this. Professor Alexy maintains that the universalisation principle is compatible with a form of weak particularism: he gives a full account of the principle of universalisation in his theory of legal argumentation: he takes from Hare the idea that evaluative propositions share this principle with descriptive propositions, thanks to the descriptive component present in their meaning; then he promotes universalisation as a rule of practical discourse in general and, considering legal discourse as a sphere of practical discourse, he extends this thesis to the latter. This considered, we will commit ourselves to affirming that Alexy is virtually universalist.

We can clearly see that in Alexy's account the law of balancing seems to entail the operation we have called "concretisation" (*supra*), in spite of Alexy's reluctance to use this word; this reticence is due to important reasons: in Alexy's account, we can never conceive "derivative constitutional rights norms"[78] as a concretisation of one (prevailing) constitutional principle; they are always the concretisation of two principles since they are rules whose antecedents are constituted by the relation of precedence between the principles. Professor Alexy clearly considers the statement that principles are "reasons for rules and only reasons for rules" as

[78] See e.g. Robert Alexy, A Theory of Constitutional Rights, cit. at 56: «[...] the result of every correct balancing of constitutional rights can be formulated in terms of a derivative constitutional rights norm in the form of a rule under which the case can be subsumed» on the same page, a couple of lines before: «A derivative constitutional rights norm is a norm for whose derivation correct constitutional justification is possible.»

a possible criterion to distinguish principles from rules[79], but he explicitly rejects its plausibility on a purely normative basis, considering that it merely provides a parameter for a distinction of degree: using this criterion, we are forced to admit, on one hand, that sometimes also norms which are (or can be) considered as rules are reasons for norms and, on the other, that sometimes norms which are considered as principles are (or can be) directly used as conclusive reasons for concrete ought-judgements. This could be a starting point for justifying the claim that there is a discretionary power to consider constitutional norms as either principles or rules, and that this power belongs to the interpreter. Nevertheless, he admits that this distinction makes a good point, capturing the fact that principles never express a *definitive right,* just a *prima facie right.* However, as we have seen, he considers that the only way to obtain a definitive constitutional right is to go through a process of balancing[80]. To sum up, he thinks that the criterion based on concretisation only introduces a distinction of degree; thus, concretisation without balancing is impossible in the principle-model, by definition: we always concretise the relation of precedence between the two principles, and never just one of the two. Accordingly, we can conclude that in Alexy's axiomatic view, a concretisation without balancing would be considered an operation that belongs to the "model of rules" for a norm specified without balancing does not match the definition of principle. We can anticipate that the problem of this account is that it does not capture all aspects of judicial construction from principles: as we have seen (*supra*) it is conceptually possible to separate concretisation from balancing and most of the time our courts concretise principles without balancing. Obviously, if we use this criterion the distinction between principles and rules will just be a distinction of degree, but we should not forget that also non-dichotomous distinctions have an important heuristic function.

We should not forget that, in Robert Alexy's account, human rights need balancing because they have the structure of principle-norms. Therefore, judicial balancing plays a key role in the justification of human rights. In Alexy's account, the existence of human rights *qua* moral rights depends entirely on their justifiability,

[79] Robert Alexy, A Theory of Constitutional Rights, cit. at 59.
[80] Id. at 50.

and on nothing else. In such a construction, the justification of human rights implies a certain degree of flexibility – in order to deal with the problem of disagreements – but, accordingly, flexibility is considered by no means arbitrariness. However, it seems quite evident that the "weighing formula" is just a procedural constraint (I would rather say, like Giorgio Pino, an *empty formula*[81]) which does not have any substantive implication: it just gives an argumentative structure that is not enough to identify the correctness of the answer and to significantly constrain any value judgement: in other words, it offers no guidance in the process of assigning values to the elements I_j and I_i of the formula. On some occasions, Robert Alexy even seemed willing to accept the conclusion that judicial balancing is just a procedural formula that is in no way sufficient to get just one right answer, or a precise answer[82]. What he claims is that this is no good reason to say that it is irrational or completely arbitrary. It is not a good reason to call it irrational because, if we accept that the syllogistic reasoning (which is also an empty formula) is rational, we should also admit that his "weighing formula" has the same degree of rationality: subsumption works according to the rules of logic, while balancing follows the rules of arithmetic[83]. Further, the presence of quantitative elements in the procedure makes it even more rational. The products of judicial balancing are also not to be considered completely arbitrary, because they are generally accepted by the community: pure objectivity can only be obtained at an ideal level, but in the real world we can content ourselves with inter-subjectivity, defined by the German author as a 'weak' form of objectivity. Frankly, I do not see any good reason to define "inter-subjectivity" as a kind of objectivity.

I will not underline any of the great merits of this third theory of balancing: they are universally recognised and really well-known worldwide. I will just express a couple of doubts.

1. In *A Theory of Constitutional Rights* Robert Alexy explicit-

[81] Giorgio Pino, Diritti e Interpretazione, cit., at 194-199.

[82] See e.g. Robert Alexy, The Construction of Constitutional Rights, cit., footnote 41 at 32: «As an inferential scheme expressed by the weight formula, balancing is a formal structure that contains, as such, no substance whatever. The application of a Weight Formula, however, requires that content – made explicit by judgements about the intensity of interference, abstract weight and the reliability of empirical assumptions – is substituted for the variables of the weight formula. For this reason one can say that balancing is procedurally substantive.»

[83] See Carlos Bernal Pulido, The Rationality of Balancing, in "Archiv für Rechts und Sozialphilosophie" Vol. 92 No. 2 (2006) 71.

ly proposed a strong distinction between rules and principles[84]. However, I am not really sure that Robert Alexy still maintains this claim, at least in the clearly descriptive part of his theory. His position seems to have somehow altered in the last few years. For example, consider the following passage.

There are two main constructions of constitutional rights: one is narrow and strict, a second, is broad and comprehensive. The first of these can be called the rule construction, the second, the principles construction. These two constructions are nowhere realized in pure form, but they represent different tendencies and the question of which one of them is better is a central question of the interpretation of every constitution that provides for constitutional review[85].

2. This rationalist theory of balancing lacks a fundamental distinction: the establishment of a conditioned priority order between the principles is something that should be conceptually separated from the justification of this process. These are very different things, which are sometimes confused in Professor Alexy's account. The fact that a decision is *a posteriori* rationally justified does not necessarily imply that it has been taken using a rational procedure.

3. Again – if we want to universalise the product of a balancing operation we will have to face all the problems that as we have seen (*supra*) – frustrate the *thesis of relevance* and that cause the impossibility to obtain indefeasible rules and judgements all-things-considered *stricto sensu.* However, Robert Alexy is fully aware of this problem[86].

4. It is not really clear if the "weighing formula" is just an explicative metaphor or if it is also a real normative proposal. If it is simply a metaphor, I would say that it is a strange metaphor indeed: perhaps, using complicated formulas and economic principles to describe legal reasoning is not the best way to provide an 'explicative' account, unless the auditorium is filled with economists and mathematics. If it is not just a metaphor, then I wonder why the German professor thinks that the weighing formula is the best way to obtain maximisation between two constitutional prin-

[84] See Robert Alexy, A Theory of Constitutional Rights, cit. at 47.
[85] See Robert Alexy, On Balancing and Subsumption, cit. at 131-132.
[86] See Robert Alexy, A Theory of Constitutional Rights, cit. at 8: «But on contrary to what Dworkin says, the exceptions incorporated into rules on the basis of principles are unquantifiable in theory as well. One can never be sure that in some new case a new exception should not be created.»

ciples. Would it not be better to use a Kaldor-Hicks scale, or to use principles as a vector of actions and not arithmetic values in the formula[87]?

By the way, I think that my exegetic doubts on this point are determined by the exclusion of the Great Division from Robert Alexy's epistemology[88].

5. As we have seen, the "weighing formula" offers just an argumentative or (at most) a procedural scheme, while the rest of Alexy's theory does not offer any substantive parameter in order to constrain the attribution of values to the principles at stake or to establish the correctness of the outcome. In other words, if a judge uses such a formula he can easily justify whatever norm he wishes to produce; the only limit on the judge's discretion seems to stem from the political and social constraints given by a (possible!) inter-subjective agreement. Where has Alexy's objectivism gone? The thesis of the emotional nature of value judgements is never rejected, at least in his defences of the proportionality principle. Elsewhere the sceptical account of value judgements has been contested by Alexy, but on the purely metaphysical basis of an explicative-existential argument[89].

6. It has been widely demonstrated that two elements do not have to be commensurable in order to be compared since it is possible to express a quantitative and not a qualitative preference[90] and thus realise an ordinal rather than a cardinal ranking.

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[87] See Jean Baptiste-Pointel, Balancing in a Vector Space, Special Workshop "Legal Reasoning: the Methods of Balancing", XXIV IVR World Congress, Beijing, 15-20 September 2009.

[88] See at least Mauro Barberis, Manuale di filosofia del diritto, Giappichelli, Torino, 2011, 53-62.

[89] Moral scepticism has been attacked by Robert Alexy in a recent attempt to justify the existence of human rights (a plenary lecture at the XXV IVR World Congress, 14-20 August 2011, Frankfurt). Robert Alexy claimed that the need to solve conflicts requires a strong interest in correctness, which is connected with a fundamental decision: whether we want to see ourselves as discursive or reasonable creatures. This is a fundamental decision and ultimately an existential decision since it is a decision about who we are. This decision it is not drawn from nowhere. It has the character of the endorsement of something that has been proven, by means of explication, to be a capability necessarily connected with human beings or, in other words, the existential argument is intrinsically connected to the explicative argument. "The explicative-existential justification connects objective with subjective elements. Objectivity connected with subjectivity is, to be sure, less than pure objectivity, but it is also more than pure subjectivity. If one adds to this the assumption that a purely objective justification of Human Rights is not possible, one has good reasons to qualify the explicative-existential argument qua objective-subjective argument as a justification of HR. This justification suffices to establish the validity of HR as moral rights, which is to say that HR exist." The existential argument concerns endorsement to define our highest vocations (Kant), while the connection objective/subjective is essentially dialectic.

[90] See Ruth Chang, Introduction, in R. Chang (ed.), Incommensurability, Incomparability, and Practical Reason, Cambridge (Mass.), Harvard University Press, Harvard 1997, 1-34; Kenneth J. Arrow, Some Ordinalist-Utilitarian Notes on Rawls' Theory of Justice, in "Journal of Philosophy", Vol. 70 No. 9, 245-263; all the ordinalist literature in general – a nice excursus on the ordinalist revolution can be

Moreover: i) it is not true that "more precise" is always equivalent to "best"; ii) the idea that is possible to quantify values is highly controversial; iii) the idea of assigning a numeric value to a (more or less) abstract principle or to a right sounds really odd. Once we have reached these conclusions, why do we have to stick to the idea of commensurability?

7. It seems to me that if judicial balancing becomes part of the definition of the concept of constitutional principles, the theory risks losing an important part of its explicative potential. As we have seen, norms that are generally qualified as constitutional principles (including by Professor Alexy) are generally applied even without a weighing process, by means of mere concretisation. What is needed is a model of principles that is built around concretisation, not around weighing. Such a model has been prefigured in the theory of Riccardo Guastini, as we have seen and, even more explicitly, in some recent works by Professor Barberis (*supra*). Once we have realised that judicial balancing is not incompatible with subsumption, we can see that the fundamental question about principles is how they get to individualisation. Considered this, judicial balancing should then be considered not as a definitional property of constitutional principles but as an *independent meta-norm*. Probably the main characteristic (and maybe the definitional feature) of principles is that they need concretisation in order to be applied, and maybe this can also offer a good criterion to draw a distinction between principles and rules, provided that we want to keep it.

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